5/30/02

Paper No. 10
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Telect, Inc.

_____

Serial No. 75/921,736

_____

Mark W. Hendricksen of Wells St. John PS for Telect, Inc.

Ellen Awrich, Trademark Examining Attorney, Law Office 116.

_____

Before Seeherman, Quinn and Drost, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Telect, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register MEGAWAVE as a trademark for "fiber optic cables; fiber optic termination cabinets; fiber optic cable frameworks for housing fiber optic termination cabinets; fiber optic terminal blocks; fiber optic connector cabinets, frames and blocks; fiber optic patchcords; fiber optic jumper cables; and multi-

fiber optic cable connectors for cross-connecting fiber optic telecommunications equipment."[1]

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark MEGAWAVE CORPORATION and design, as shown below, and with the word CORPORATION disclaimed, previously registered for "custom manufacture of antennas" in Class 40; "engineering, design, testing and consultations in the field of electromagnetics, antennas and radio wave propagation" in Class 42; and "computer software for analyzing electromagnetics related problems; and antennas" in Class 9[2] as to be likely, if used on applicant's identified goods, to cause confusion or mistake or to deceive.

The appeal has been fully briefed, but an oral hearing was not requested.[3]

---

[1] Application Serial No. 75/921,736, filed February 17, 2000, and asserting a bona fide intention to use the mark in commerce.
[2] Registration No. 2,099,890, issued September 23, 1997.
[3] In its reply brief applicant makes the statement that "It seems that the predominant references cited by the examiner relate to the *fiber optic cable* recitation more than the other

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We find that the marks are very similar in appearance, pronunciation and connotation. Applicant's mark consists of the term MEGAWAVE, while the cited mark is the identical word, followed by the word CORPORATION, which does not have

---

goods identified in this application. Applicant would be willing to exclude or delete the 'fiber optic cable' if deemed necessary, but based on the argument and case law set forth above, thinks that should be unnecessary." p. 3. We have given no consideration to this comment. This mention of a possibility certainly does not amount to a request for an amendment to the identification. If applicant had wished to amend the identification, the proper procedure would be to submit a request for remand. Moreover, requests for remand are granted only upon a showing of good cause, and the fact that applicant waited until its reply brief even with its half-hearted suggestion of amending its identification would not constitute good cause, given that the references cited by the Examining Attorney were submitted during the course of examination, and before the notice of appeal was even filed.

It is also noted that, in its main brief, applicant states that it "would be willing to specifically exclude antennas from its description of goods, if acceptable to the Board and/or examiner." p. 5. Such a request is unacceptable for the reasons stated above; moreover, because "antennas" are not part of applicant's identification of goods, such an amendment would serve no purpose.

source-identifying significance, as indicated by the fact that it has been disclaimed. Nor does the design element in the registered mark serve to distinguish the marks. It is a mere swirl which might be suggestive of an antenna or merely an abstract design; in either case, it is the word portion of the cited mark by which the registrant's goods and services will be referred to, and consequently, it is the word portion which will be noted and remembered. See **In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties); **In re Appetito Provisions Co.**, 3 USPQ2d 1553 (TTAB 1987) (in evaluating the similarities of marks, a particular feature or portion of a mark can thus be accorded greater weight if it would make an impression upon purchasers that would be remembered and relied upon to identify the goods or services).

Turning next to a consideration of the goods and services, we must first comment on what applicant's goods are. In the application as originally filed, applicant identified its goods as "telecommunications equipment; fiber optic cable termination cabinets, frames and blocks;

and fiber optic cable connector cabinets, frames and blocks; fiber optic pigtails; fiber optic patchcords and jumpers; and multi-fiber optic cable assemblies for cross-connecting fiber optic communications equipment." The Examining Attorney objected to some of the terms, such as "equipment" and "assemblies," in the original identification because they were indefinite, and found other terms, such as "frames and blocks," to be unacceptable. Applicant then amended its identification to that listed in the first paragraph of this opinion, and specifically deleted "telecommunications equipment." It should be noted that, although applicant has, in arguing against any likelihood of confusion, described its goods as being typically used by telephone service providers, there is no such limitation in the identification.

It is well-established that it is not necessary that the goods and/or services of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same persons under circumstances that

could, because of the similarity of the of the marks, give rise to the mistaken belief that they originate from the same producer. **In re International Telephone & Telegraph Corp.**, 197 USPQ 910, 911 (TTAB 1978).

In this case the Examining Attorney has demonstrated the requisite relationship through excerpts of articles taken from the NEXIS data base. These excerpts show that fiber optic cables are part of antenna systems, and that fiber optic cables and antennas are used together in communications systems:

> Andrew Corp's InCell fiber-optic distributed antenna system for in-building wireless communications extends radio frequency coverage in hard-to-penetrate indoor areas.
> "Global Telephony," February 2001
>
> BriteCell is a single or multi-ban fiber-optic distributed antenna system.
> "Airports," September 12, 2000
>
> Signals are passed from the antenna to the workstation via fiber-optic links.
> "Journal of Electronic Defense," August 1, 2000
>
> Ortel also makes a variety of products for satellite communications such as a fiber-optic antenna distribution system for applications such as high-definition television and broadcast centers.
> "Weekly Corporate Growth Report," February 14, 2000
>
> ...trying to perfect a concept largely articulated by British

> Telecommunications P.L.C: small wireless communications devices--essentially antennas--attached to fiber-optic lines every few hundred feet.
> "The New York Times," January 1, 2000
>
> Connecting the wireless antennas will be a wireline and fiber optic cable network owned by TEPSP.
> "Newsbytes," September 13, 1999
>
> By using a fiber optic distribution system to feed the antennas inside the shopping mall, far higher densities of cellular users can be supported. ...The NTL installation consists of over six miles of fiber-optic cabling, connecting 36 antennas located throughout the shopping malls back to a multi-user equipment room on the roof of the building.
> "Newsbytes," August 23, 1999
>
> The wireless company's antenna is connected to an underground fiber-optic trunk cable--the Internet backbone of the country.
> "Albuquerque Tribune," November 5, 1998
>
> It beams voice and data at more than 10 megabits per second to a hub antenna, which feeds it into a fiber-optic network, bypassing the slower local phone lines.
> "USA Today," June 3, 1998.

Applicant argues that the customers for its fiber optic products and the registrant's antennas and antenna design, testing, etc. services are different because applicant's goods are "typically utilized by telephone service providers who merely pass voice and data

transmissions through their lines to their final destination," while "antennas, the custom manufacture of antennas, and software for analyzing electromagnetics related to antennas deal with the transmission through air of RF [radio frequency] and other signals." Applicant also asserts that the market channels are different for consumer antennas and industrial applications.

To the extent that applicant may be attempting to distinguish its goods from the registrant's goods and services based on the specific types of goods and services on which the respective marks are used, and the actual customers for those goods and services, such a distinction is not permitted. The question of likelihood of confusion must be determined on the basis of an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. See **Canadian Imperial Bank of Commerce v. Wells Fargo Bank,** NA, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); **In re William Hodges & Co. Inc.**, 190 USPQ 47 (TTAB 1976). As identified, applicant's fiber optic cables, fiber optic termination cabinets, fiber optic terminal blocks, etc. are not limited to use by telephone service providers, and

could be used in the same systems which use applicant's antennas. Nor are the registrant's antennas and related services limited to specific types of antennas or specific consumers. In fact, although applicant suggests that the registrant's antennas are for "the consumer antenna side," the registrant's website material which was submitted by applicant indicates that its antennas are for use by the military and the automobile industry.[4]

Applicant's primary argument is that the purchasers for the applicant's and registrant's respective goods are services are sophisticated. Applicant asserts that they are "typically engineers with a particular need or specification for an antenna or for telecommunications equipment, such as fiberoptics." We do not dispute that the purchasers for applicant's and the registrant's goods and services would be knowledgeable, sophisticated and careful consumers. However, because of the close relationship between the goods and services, with antennas and fiber optic cables actually being used in the same system, even sophisticated purchasers are likely to be

[4] Applicant refers in its brief to an attached Exhibit A consisting of material from the registrant's website. No such exhibit was attached and, indeed, any evidence newly submitted with the brief could not be considered. However, applicant did timely submit such material with its response to the first Office action, and it is to this material which we assume the brief refers.

confused by the use of the substantially similar marks at issue herein.

Finally, applicant contends that "the term MEGA and WAVE, when considered in the field of antennas, are low in the spectrum of distinctiveness and not entitled to broad protection individually or in combination as applied to antennas." Brief, p. 5. Although MEGAWAVE has a certain suggestive connotation, there is no evidence of third-party usage or registration which would lead us to conclude that MEGAWAVE CORPORATION and design is a weak mark. It is certainly strong enough to prevent the registration of the substantially similar mark MEGAWAVE for goods as related as those in this case.

Decision: The refusal of registration is affirmed.